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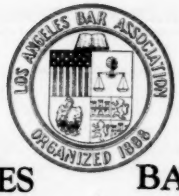

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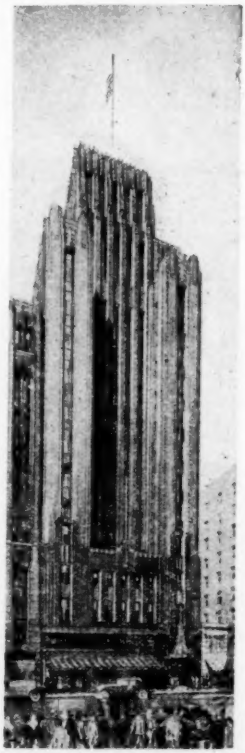

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Civil Jurisdiction of Municipal Courts

STATEMENT OF THE LAW AS IT SEEMS TO EXIST. HISTORY OF ACT. SUCCINCT RESTATEMENT OF LAW FIXING JURISDICTION. MANY POINTS CLARIFIED FOR LAWYERS

By Henry M. Willis, Judge of Los Angeles Municipal Court

In the preparation and presentation of this article for publication in the Bar Bulletin, the author's purpose is to avoid expression of opinion in respect to any uncertain or controversial matters, and to confine the discussion of Municipal Court civil jurisdiction within historical and academic limits, with the view of simply stating the law as it now appears to exist, with the history of its origin and development.

In November, 1924, the people of this State approved certain amendments to the constitution which were intended to provide for the creation of a new court of record to be known as the "Municipal Court," and to establish jurisdiction over certain specified cases, such courts to be established only in chartered cities containing a population of more than 40,000 inhabitants, all for the manifest purpose of giving this new court an enlarged jurisdiction over township and police courts, which it superceded when established in a city, in order to relieve the Superior Court of the County wherein such court might be established of some of its burden of civil litigation. To accomplish this, Section 5 of Article VI of the constitution was first amended so that the former original jurisdiction of Superior Courts over cases at law in which the demand exceeded $300.00 was qualified by the amendatory words "except as hereinafter provided." Then in Section 11 of the same article it was provided:

> "Municipal Courts shall have original jurisdiction, except as hereinafter provided, in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less, and of actions of forcible or unlawful entry or detainer where the rental value is one hundred dollars or less per month, and where the whole amount of damages claimed is one thousand dollars or less, and in cases to enforce and foreclose liens on personal property where the amount of such liens or the value of the property is one thousand dollars or less. * * * The Legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in the particulars otherwise specified in this section."

The Municipal Court Act

In its session of 1925, the Legislature enacted what is known as the "Municipal Court Act," Section 29 of which related to and attempted to define the civil jurisdiction of Municipal Courts; and read as follows:

> "Each Municipal Court shall have exclusive original jurisdiction in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less, and of actions of forcible or unlawful entry or detainer where the rental value is one hundred dollars or less per month, and where the whole amount of damages claimed is one thousand dollars or less, and in cases to enforce and foreclose liens on personal property where the amount of such liens or the value of the property is one thousand dollars or less, *arising within the city* or city and county. * * * Each Municipal Court shall have concurrent original jurisdiction with the Superior Court or Justice's Courts of all such cases *arising within the County* in which such court is situated except such territory as is within the exclusive jurisdiction of any other Municipal Court."

It is to be noted that the language of the above section down to the words, "arising within the city," is exactly that used in the constitution, excepting the word "exclusive." The last sentence is entirely of legislative origin.

By the foregoing provisions it appears that the legislature, under its grant of power to "provide for the jurisdiction thereof, except in the particulars otherwise specified in this section," gave Municipal Courts *exclusive original jurisdiction* of the constitutional classes of cases, *arising within the city* wherein such court was established.

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This seems clearly a proper exercise of the power granted, as no limitation of the constitutional grant of jurisdiction to Municipal Courts was thereby effected. On the other hand, the original jurisdiction of other courts in the state, including the Superior Court, over such cases was taken from them, patently under authority of the grant of power above quoted, when read in connection with Section 5 of Article VI, which fixed the jurisdiction of Superior Courts "except as hereinafter provided."

As to the last clause or sentence above quoted from Section 29, it is fairly clear that the legislature intended that Municipal Courts should have concurrent original jurisdiction with the Superior and Justice's Courts of all such cases *arising within the county* in which it is situated, excepting in territory within the exclusive jurisdiction of another Municipal Court; thus preserving for the Superior Court and Justice's Courts in the county, their original jurisdiction of such cases within their respective limits.

By the use of the expressions "arising within the city" and "arising within the county" in this section, a novel condition was created in legislative action respecting jurisdiction of courts in California. Apparently for the first time, the phrase "cases arising" had been adopted as a legislative measure of jurisdiction. Theretofore, its use seems to have been confined to statutes relating to limitation of actions and change of place of trial.

Definitions of Terms Used

In order to understand just what cases are embraced by this legislative act, and which come within the purview of the jurisdiction as defined, it is necessary to secure a definition of the terms used. Original jurisdiction simply imports a court wherein an action may properly be commenced, as distinguished from appellate jurisdiction, which imports a court to which an appeal may be taken from a judgment or order entered in a case commenced in a lower court. A "case" in its legal sense is a contested question before a court of justice,—a suit or action or cause. In its generic sense, when applied to legal proceedings, it imports a state of facts which furnish occasion for the exercise of the jurisdiction of a court of justice. (Buell vs Dodge, 63 Cal. 553: Calderwood vs Peyser, 47 Cal. 110-15). An action is an ordinary proceeding in a court of justice and is defined by section 22 of the Code of Civil Procedure. It is simply the right or power of prosecuting in a judicial proceeding what is owed by one—to enforce an obligation. The action therefore springs from the obligation, hence the "cause of action" is simply the obligation. (Frost vs. Witter 132 Cal. 421-26). So while a "case" in its primary sense is a "cause," in its generic sense it is a "cause of action," which arises or accrues, and becomes the basis of the action by which the complainant invokes the exercise of jurisdiction of a court of justice to enforce the obligation. In the sense in which the word is used in this statute, the "case" must have "arisen" before the jurisdiction of the court is invoked by action. A "cause of action" or "case" arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several states. (Pomery on Remedies and Remedial Rights, section 452 et seq; McKee vs. Dodd 152 Cal. 637).

The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. The time when a cause of action arises determines also the place where it arises, for, when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises. and a cause of action can arise but once and when it once accrues, it remains in force until extinguished or satisfied or is barred by statute.

Jurisdiction is defined to be the power to hear and determine. This jurisdiction in turn exists over subjects or "cases," over persons and over territory. By the organic act usually the subject matter is determined, and under the comity existing between states, jurisdiction of actions which are transitory in their nature is assumed by courts when the defendant is found within its territorial limits. The territorial limits are usually fixed by legislative act, under delegated power in the organic law. Territorial jurisdiction is defined as the power of a tribunal considered with reference to the territory within which it is to be exercised.

Original and Concurrent Jurisdiction

By Section 11 of Article VI, the Municipal Courts were granted original jurisdiction of *all* cases therein specified, not just those arising within the city or those arising within the County wherein such court was established, and the use of the words "exclusive" and "concurrent" in the Statute of 1925, must be considered and interpreted as affecting the jurisdiction of Superior Courts and justice's courts, and not as a limitation in any sense upon the original constitutional jurisdiction of the Municipal Courts.

The foregoing attempts to give the status of the jurisdiction of Municipal Courts and its corresponding effect upon that of Superior Courts as defined by the Constitution and the Municipal Court Act of 1925, and briefly restated shows original jurisdiction of Municipal Courts over all the cases as specified in the Constitution, being declared exclusive as to all cases arising within the city, and concurrent with other courts, within their respective jurisdictions, as to all cases arising within the county outside any city therein having a Municipal Court.

In November, 1928, amendments to the Constitution radically changed the basic law relating to jurisdiction of Superior and Municipal Courts. Whereas previously the status of jurisdiction of both Superior and Municipal Courts over cases was frozen into the constitution, the constitutional amendments of 1928 conferred plenary power on the legislature to fix the jurisdiction of Municipal Courts, with the resultant deprivation of jurisdiction of the Superior Courts over such cases as were given over to Municipal Courts, and all that portion of section 11 of Article VI of the constitution defining the jurisdiction of Municipal Courts became inoperative—dead letters, as will be made to appear clearly by a study of the Article as amended.

First, section 5 of the Article was amended to read as follows:

> "The Superior Courts shall have original jurisdiction in all civil cases and proceedings (except as in this Article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justice's or other inferior courts.)"

And secondly, section 13 of the same Article was amended to read as follows.

> "Notwithstanding any provision contained in this article, the Legislature may fix by law the jurisdiction of municipal courts and inferior courts in cities having municipal courts which may be established in pursuance of this article, and may fix by law the powers, duties, qualifications and responsibilities of judges thereof. Any action heretofore taken by the Legislature in fixing exclusive jurisdiction of municipal courts in cases at law is hereby ratified and confirmed."

Latest Amendment to Act

Pursuant to the authority conferred in the foregoing section, the Legislature in its session of 1929, amended section 29 of the Municipal Court Act to read as it now appears in the published statutes. (Stats. 1929, p. 837) as follows:

> "Sec. 29. Each Municipal court shall have exclusive original jurisdiction of all civil cases and actions, arising within the city or city and county in which such municipal court is established of the following classes:
>
> 1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less.
>
> 2. All actions of forcible entry or forcible or unlawful detainer, where the rental value is two hundred dollars or less per month, and where the whole amount of damages claimed is two thousand dollars or less.
>
> 3. All actions to enforce and foreclose liens on personal property, where the amount of such liens is two thousand dollars or less.
>
> In cities or cities and counties wherein such municipal court is established, and wherein an inferior court has been established, and its jurisdiction determined as provided by law, such municipal court shall have concurrent jurisdiction with such inferior court to the extent of its jurisdiction.
>
> Each municipal court shall have original jurisdiction of all cases specified in subdivisions 1, 2 and 3, hereinabove arising outside the city in which a municipal court is established, and within the county in which such municipal court is established, and also of all such cases arising outside the county in which a municipal court is established, in which any proper defendant named therein resides or has his place of business within the county wherein such municipal court is established.

Each municipal court shall have original jurisdiction, concurrent with that of justices' or other inferior courts in the county in which such municipal court is established, of all civil cases of which such justices' or other inferior courts are given jurisdiction, excepting civil cases of which such justices' or other inferior courts are given exclusive jurisdiction, and excepting cases cognizable in such courts, sitting as small claims courts.

Each municipal court shall have jurisdiction in all cases in equity, when pleaded as defensive matter or by way of cross-complaint in any case at law commenced in the municipal court, of which it has exclusive jurisdiction. Each municipal court shall have jurisdiction in all actions to enforce and foreclose liens of mechanics, material-men, artisans and laborers, where the amount of such liens is two thousand dollars, or less; provided, that where an action is pending in the superior court and affects property, which is also affected by an action pending in the municipal court to foreclose such a lien, or where the total amounts of such liens sought to be foreclosed against the same property aggregate an amount in excess of two thousand dollars, the municipal court, upon motion of any interested party, shall order such action pending therein to be transferred to the proper superior court. Upon the making of such order, the same proceedings shall be taken as are provided under section 399 of this code, with respect to the change of place of trial."

It will be noted that all jurisdiction conferred on Municipal Courts by such amendment of 1929 is predicated on the basis of "cases arising," except only cases in equity, pleaded as defensive matter or by cross complaint, and cases involving mechanics liens, in which the expressions used are "all cases" and "all actions," respectively.

However, the territorial limit of jurisdiction of Municipal Courts over cases involving foreclosure of mechanics liens is determined by section 5 of Article VI of the Constitution, wherein it is provided that all actions for the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, is situated. No concurrent jurisdiction is conferred or mentioned, excepting with justices or other inferior courts.

Basis of Jurisdiction

It will be further noted that the sole basis of jurisdiction of Municipal Courts over those classes of cases which arise within the city and those which arise within the county, outside the city, is found in the expression, "cases arising," whereas an additional basis of jurisdiction of the classified cases, arising outside the city, consists in the fact of residence or place of business of a proper defendant, named therein, within the county in which such Municipal Court is established.

When section 29 of the Municipal Court Act was revised and amended by the Legislature in 1929, there was a very definite belief existing on the part of those who prepared the revised section, that any grant of jurisdiction over any case or classes of cases to the Municipal Court would operate automatically to deprive the Superior Court of the county wherein the Municipal Court was established, of any jurisdiction of such case or classes of cases. In short that there could be no concurrent jurisdiction between Superior and Municipal Courts over any case or class of cases. This belief was founded on the new language used in section 5 of Article VI, relating to jurisdiction of Superior Courts, wherein it was provided that Superior Courts should have jurisdiction in all civil cases and proceedings except in cases and proceedings in which jurisdiction is or shall be given by law to municipal or justices' or other inferior courts. As the Legislature did, by the 1929 amendment of section 29 of the Municipal Court Act, grant to the Municipal Court jurisdiction of all cases specified in subdivisions 1, 2 and 3, arising within the county, and outside the city, and also of all actions to foreclose mechanics liens amounting to $2,000.00 or less, (and limited by the Constitution to those arising within the county)—exclusive as to those in subdivisions 1, 2 and 3, arising within the city, and concurrent with justice's or other inferior courts as to those arising in the county outside the city—(and of which justice's courts are given jurisdiction)—it would seem to follow as a legal conclusion that the Superior Court of the county was thereby excluded from jurisdiction in all such cases, including mechanics liens of $2,000.00 or less. However, the Appellate Court of the Second District, Division 2, has on two recent occasions, apparently decided otherwise, and this article would

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not be complete without a citation of such decisions.

In Johnstone Gas Furnace Corp. vs. Superior Court 62 C.A.D. 415, decided May 29, 1930, that court held that section 29 of the Municipal Court Act of 1929 failed to extend the jurisdiction of the Municipal Court to actions for the foreclosure of mechanic's liens to those actions arising outside the city limits.

The Court says:

"Therefore the section giving to the Municipal Court jurisdiction in actions to 'enforce and foreclose liens of mechanics, artisans and laborers, where the amount of such liens is two thousand dollars, or less,' is modified and restricted by the language of the opening section of the law to those cases 'arising within the city or city and county in which such municipal court is established'."

In Scott vs. Superior Court, 63 C.A.D. 551, the same court on October 6, 1930, denied a writ of prohibition sought to prevent the Superior Court of Los Angeles County from proceeding to try a case of foreclosure of mechanic's liens for an amount less than $2,000.00, on property situated in the city of Pasadena, on the ground that the Superior Court had exclusive jurisdiction of mechanics lien cases, which arose outside the limits of the city having a Municipal Court, and within the territorial jurisdiction of the Superior Court.

Therein, after quoting the new section 5 of Article VI of the constitution, defining the jurisdiction of Superior Courts, the court says:

"Section 29 of the original act defining the jurisdiction of municipal courts (Stats. 1925-27, p. 1067), provided that they should have exclusive original jurisdiction in all cases at law in which the demand, exclusive of interest, amounted to $1,000.00 or less, arising within the limits of the City, and jurisdiction concurrent with the Superior Court in actions for $1,000.00 or less, arising outside of the city limits, but within the county. Thereafter, by section 13, article VI, of the Constitution, the Legislature was empowered to fix the jurisdiction of Municipal Courts, and pursuant thereto such jurisdiction was so fixed at $2,000.00, upon the same conditions as to territorial limitations. From this it follows that the Superior Court was given original jurisdiction in demands for amounts exceeding $300.00, but less than $2,000.00, which would arise outside the limits of the city having a municipal court and within the territorial jurisdiction of the Superior Court (Johnson vs. Wolf, 78 C.D. 427). From the foregoing it is apparent that the Superior Court has exclusive jurisdiction of the suits in controversy."

Concurrent Jurisdiction Discussed

In the 1925 statute, Superior Courts were given concurrent jurisdiction with Municipal Courts in actions involving demands exceeding $300.00 and less than $1,000.00, but the act of 1929, omitted that provision and after granting municipal courts jurisdiction of all the cases specified arising in the county and not exceeding $2,000.00 in demand, declared that such jurisdiction should be concurrent with that of justice's and other inferior courts—not of the Superior Court. The case of Johnson vs. Wolf cited as authority in the above decision was founded on a motion to dismiss an appeal and was decided upon the statute as it existed before the 1929 amendment was made, at a time when the 1925 statute expressly declared that Superior Courts and Municipal Courts should have concurrent original jurisdiction over the cases specified, and arising in the county outside the city.

It will be noted that in the Johnstone case, above quoted, decided in May, 1930, the Appellate Court declared in effect that Municipal Courts, under the provisions of the Constitution and the Statute of 1929, had no jurisdiction over mechanic's lien cases of any amount arising outside of the city, while in the Scott case, decided in October, 1930, the same court declared that under the Constitution and the Statute of 1929, the Superior Court had exclusive jurisdiction of mechanic's lien cases arising within the county outside such city, and had original jurisdiction of all cases in which the demand exceeded $300.00, but was less than $2,000,00, arising outside the city wherein a municipal court was established. The apparent effect of these two decisions is to limit the jurisdiction of municipal courts in mechanic's lien cases to those arising within the city, and in all other cases arising in the county outside any city, wherein such municipal court is established, the Superior Court is declared to have concurrent jurisdiction with Municipal Courts therein where the demand exceeds $300.00 and is less than $2,000.00. Both decisions hold that Superior Courts have

exclusive jurisdiction of mechanic's lien cases arising outside any city in the county wherein a Municipal Court is established, while the later decision appears to decide that Superior Courts in such counties have original jurisdiction of all other cases arising within the county, outside such Municipal Court cities, wherein the demand exceeds $300.00. Clearly, this latter appears to be *obiter dictum*, and the conclusion that Superior Courts therefore had exclusive jurisdiction of the mechanic's lien cases therein involved, seems to be a *non-sequitur*.

The foregoing references to these two decisions are not offered as criticisms, but by way of review and analysis in order to arrive at a basis for a restatement of the law as it appears now to exist, after considering together the statute and these decisions interpreting or construing it.

Restatement of the Law Fixing Jurisdiction

Disregarding any effect of the *dictum* concerning jurisdiction of the Superior Court in cases arising in the county, wherein there is a Municipal Court, where the demand exceeds $300.00, the following is offered as a succinct restatement of the law fixing jurisdiction of Municipal Courts as it now exists.

1. Exclusive original jurisdiction of all cases arising within the city where a Municipal Court is established, of the following classes:
   a. All cases at law where the demand or value of property in controversy amounts to $2,000.00 or less.
   b. All actions of forcible entry or forcible or unlawful detainer, where the rental value is $200.00 or less per month, and the whole amount of damage claimed is $2,000.00 or less.
   c. All actions to enforce personal property liens of $2,000.00 or less in amount.
   d. All actions to enforce mechanic's liens where the amount is $2,000.00 or less, with provision requiring a transfer of such actions to the Superior Court, in the event there is pending in such Superior Court another similar action affecting the same property involved in the Municipal Court action.
   (Note: In order that the Superior Court may entertain such action arising within such a city, it must appear therein that the amount of the mechanic's liens, sought therein to be foreclosed, exceeds $2,000.00; — otherwise such Superior Court is excluded.)
2. Original jurisdiction of all cases in equity, (in addition to those equity cases included in subdivisions b, c, and d, above), when pleaded as defensive matter or by way of cross-complaint in any case at law commenced in such court, of which it has exclusive jurisdiction.
   (Note: The effect of this provision is to limit jurisdiction of such equity cases to those only which may be properly pleaded as defensive matter under section 438 C.C.P., or by cross-complaint under section 442 C.C.P., in the cases specified in subdivision a above.)
3. Original jurisdiction of all cases specified in subdivisions a, b, and c, above, arising within the county, outside a city wherein there is a Municipal Court.
   (Note: The effect of this provision, under section 5 of Article VI of the Constitution, is to exclude the Superior Court from jurisdiction of the cases specified, and to render the Municipal Court jurisdiction concurrent with justice's or other inferior courts up to $300.00 or $1,000.00, as the case may be, in cases specified in subdivisions a and c, and where the rental value does not exceed $75.00 per month in cases specified in subdivision b.)
4. Original jurisdiction of all cases specified in subdivisions a and c, above, arising outside the county wherein such Municipal Court is established, and in which cases any proper defendant named therein resides or has his place of business within the county wherein such court is established.
   (Note: Cases specified in subdivision b, above, are purposely omitted in this restatement, as it is manifest that no Municipal Court may have original jurisdiction of any forcible entry or forcible or unlawful detainer action affecting real estate situated outside the county wherein such court is established, as section 5 of Article VI of the Constitution requires all actions for the recovery of the possession of real property to be commenced in the county where the property, or some part thereof, is situated.)
5. Original concurrent jurisdiction of all cases of which justice's or other inferior courts of the same county are given jurisdiction, excepting cases of which such justice's or other inferior courts are given exclusive jurisdiction, and except-

ing small claims cases commenced under section 927 C.C.P.

6. Exclusive original jurisdiction of all small claims cases commenced under section 927 C.C.P., where defendant is a resident of the city wherein such court is established.

(NOTE: As no inferior court has been established by law in cities having Municipal Courts, it has been determined by the Supreme Court that such Municipal Courts must receive, hear and determine small claims cases, defined in section 927 C.C.P.—See Hughes vs. Municipal Court 200 Cal. 215.)

WILL SERVE TO SOLVE JURISDICTIONAL PROBLEMS

This restatement is made with the hope, and some small degree of expectation, that it will serve to help and guide members of the bar in solving questions of jurisdiction, which are often quite perplexing, so that a contemplated action may be commenced in the proper court.

In considering cases specified in Subdivision 1 above, all that need be considered and pleaded to reveal jurisdiction are (1) the place where the case arose, to-wit, the city wherein the court is established, and (2) the amount of demand or value, to-wit, not to exceed $2,000.00, or the rental and demand, to-wit, not to exceed $200.00 per month with $2,000.00 or less demand.

In considering cases specified in subdivision 2 above, one must ascertain if the case commenced is one at law of which the Municipal Court has exclusive jurisdiction, and if such be the case, then an equity case may be pleaded and made in the answer or by cross-complaint.

In considering cases specified in subdivision 3 above, there should be considered and pleaded (1) the place where the case arose, and (2) the amount of demand or rent and demand, as the case may be.

In considering cases specified in subdivision 4 above, there should be considered and pleaded (1) the place where the case arose, (2) the amount of demand, or value of personal property involved, and (3) residence or place of business of a defendant within the county.

Subdivision 5, above, contains only a declaratory statement of a concurrent jurisdiction with justice's courts over cases already embraced in subdivision 3, while the small claims cases referred to in subdivision 6 require only a consideration of the amount of demand to-wit $50.00 or less, and residence of the defendant, to-wit, within the city.

As it must manifestly appear, from the foregoing review, that there are defects in the statute of 1929, and that the decisions above mentioned have the effect of depriving the Municipal Courts of jurisdiction of mechanic's lien cases arising in the county outside the city wherein such court is established, and that the latter decision appears to confer on Superior Courts jurisdiction of cases of over $300.00 in demand, arising in the county outside a Municipal Court city, it becomes apparent that further legislative action will be required at the 1931 session to remedy such defects and to so clarify the statute that no uncertainties or doubts may exist in respect to the extent and limits of jurisdiction of either the Superior Court or Municipal Court. A bill to accomplish that purpose is now in course of preparation, and in due time will be published, so that members of the bench and bar may read and study the same and make their suggestions for improvement thereof.

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MARCH MEETING

of the Los Angeles Bar Association

THURSDAY, MARCH 26TH AT

ALEXANDRIA HOTEL, 6:30 P.M.

Loyd Wright, new chairman of the Entertainment Committee of the Los Angeles Bar Association announces that Mr. L. Ward Bannister of Denver, Colorado, will be the chief speaker at the next monthly meeting to be held at the Alexandria on Thursday evening, March 26th.

Mr. Bannister is a prominent attorney of Denver and is lecturer at Harvard and Columbia Law Schools. He was also a member of the commission which attempted to proportion the Colorado River rights relative to the Boulder Dam among the various interested states.

The subject of Mr. Bannister's speech will be "The United States and World Peace."

The talk will be founded upon personal observation gained at a visit to the World Court and the League of Nations.

Irving M. Walker, president, will preside at the meeting.

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The President's Letter to the Members of the Los Angeles Bar Association

Fellow Members:

The trials and tribulations of office may bring about a different attitude but at the present writing your President feels that he is rather too young to presume to give much advice or to indulge in much philosophy, and somewhat too old to give voice to the enthusiasms of youth. Under the circumstances he feels impelled to treat of matters that, at least in his opinion, seem to be of some practical interest to the members of the Association.

Nothing is more vital to the life of the Association than the monthly gatherings which bring the members together. Each of you probably has some ideas in regard to these monthly meetings, and your President has some of his own which may or may not meet with the approval of the Program Committee but which he takes the liberty of stating in the hope that some of you may be induced to make helpful suggestions.

It is my understanding that the monthly meetings are primarily for the purpose of enabling the members of the Association to become better acquainted. Such acquaintances are pleasant as such and, moreover, it is easier and more satisfactory to practice law when one knows the lawyer with whom one is dealing. I can speak certainly and from experience on this point.

In the second place, these meetings should be, I am sure you will agree, both entertaining and instructive. Needless to say, it is not always easy to combine these two qualities but every effort should be made to effect the combination. Unless one has been a member of the Program Committee of this or some other organization, one can hardly realize the difficulty in securing speakers that can both instruct and please. There must, however, be many such, even though it is difficult to find the right man at the right time—right for him and right for the Association. From time to time many distinguished people visit Southern California but frequently their presence is unknown to the officers of your Association or the members of the Program Committee. If you yourselves now or at any time know of persons who would add to the enjoyment of the monthly meetings of the Association, you should get into communication with the Chairman of the Program Committee, who at this time happens to be Mr. Loyd Wright.

I have also one other very definite idea in regard to these monthly dinners. I am of the firm conviction that the most successful dinner meetings are those that end at a reasonably early hour, and I shall earnestly endeavor to persuade the Program Committee that this is a desirable thing. I have no doubt that many more persons would attend if they were assured that attendance did not mean that they were committed to a long evening.

Finally, if any of you have suggestions to make as to how the meetings of the Association can be made of greater benefit or enjoyment, please let your Program Committee have these suggestions. It may not be possible to act upon all of them but some of them certainly will be timely and useful. It is my earnest hope that in the future even more interest will be taken in our meetings than has been the case in the past. The Program Committee will do its part and will do it much better with the assistance and co-operation of the membership at large.

Sincerely yours,

IRVING M. WALKER.

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Late Interesting Cases on Automobile Negligence

THE HAZARD OF EXTRA TRAINS — DUTY TO GET OUT, WALK AHEAD, AND LOOK — ASSURANCE AFFORDED BY WIG-WAGS — EVIDENCE OF HABIT OR CUSTOM — INFERENCE OF AGENCY FROM OWNERSHIP OF CAR

By Mark A. Hall, of the Los Angeles Bar

Motorist Struck by Extra Train

In *Lindsey v. P. E. Ry. Co.*, 63 C. A. D. 1455 (rehearing at 64 C. A. D. 432), plaintiff's decedent was driving his auto along a highway, approaching a railroad crossing. His view of the track was obstructed by trees, etc., in such a way that he could not see up the track until he got within ten feet of the nearest rail.

A passenger train, running on its regular schedule, went by while the decedent was still approaching the crossing. It was followed, at a distance of 1100 to 1300 feet, and within a minute to a minute-and-a-half, by a work-train which was an extra, not running on any regular schedule. The decedent apparently did not see or hear the work-train, but drove onto the track in front of it and was killed.

The defendant railway company claimed that the decedent was guilty of contributory negligence as a matter of law, under the familiar California rule that in a case where a motorist's view is so obstructed that he cannot see a train approaching on a track intersecting his path, until his machine is in grave danger, ordinary care requires him to stop, alight, and walk ahead to a point where he can see up and down the tracks, before proceeding onto the crossing. And the Court holds that to be, ordinarily, the law.

The plaintiff, however, sought to escape the rigor of that rule "by applying an exception to it" that where the driver of a vehicle on a public highway sees a train running on a regular schedule over a single-track road, pass in front of him and then proceeds upon his way, and is struck by a second train not running on a regular schedule, but which is following the first train very closely in point of both time and distance, an unusual circumstance is presented which removes the case from the general rule that the driver's failure to stop, get out, walk ahead, and look, constitutes contributory negligence as a matter of law, and makes the question of his contributory negligence one of fact to be determined by the jury.

The District Court of Appeal agreed with the plaintiff, and held that under such circumstances the question of the driver's contributory negligence, even though he did not stop, alight, and walk forward to a point where he could see up and down the track, was not one for the court to pass on as a matter of law, but was for the jury as a matter of fact. In this connection, see also *Pietrofitta v. S. P. Co.*, 62 C. A. D. 1218.

"Guarded Crossing" Cases

Likewise, in *Ogburn v. A. T. & S. F. Ry. Co.*, 63 C. A. D. 1471, the Court again recognized the general rule that at a railroad crossing where the motorist's view of the track is obstructed, he must "stop, look and listen, even to the extent, if necessary, of getting out and walking ahead to a point where he can assure himself that no train is approaching." (Citing numerous cases). But in that case the railroad company had installed a wigwag device at the crossing, which was supposed to warn travelers on the highway of the approach of trains. The plaintiff, when nearing the crossing, watched the wigwag, which was not moving; she relied upon the wigwag, and from its absence of motion concluded that no train was approaching; she therefore went ahead, and was struck by an oncoming train which, apparently through some defect in the signalling device, had failed to set the wigwag in motion.

The Court held that this situation constituted another exception to the general rule, and that the question of plaintiff's failure to stop, get out, walk ahead, and look, was, under the circumstances, for the jury. The Court further held that where a railroad company, by installing wigwags and other safety devices, causes a traveler on the highway to relax his vigilance, a lesser degree of care is required from the traveler than would be the case had the wigwag not been installed; that the traveler is not relieved entirely from taking precautions for his own safety, and is not permitted to rely solely upon the wigwag, but that the question of whether he exercised reasonable care

under the circumstances was one for the jury.

Evidence of Habit or Custom

In *Lindsey v. P. E. Ry. Co., supra,* evidence had been admitted of the careful habits of plaintiff's decedent when about to cross a railroad track. Two eye-witnesses who saw the actual accident in which the deceased was killed, testified concerning the actual conduct of the decedent. And the Court held that it was error to admit the evidence of deceased's habits in this respect, saying:

"When admissible, evidence of the habit of deceased should have been limited to habit at the place of the accident. Evidence at another place and under different circumstances has been held too remote (citing cases).

"Evidence of habit is not admissible where there are eye-witnesses to an accident . . . The admission of this class of evidence is now limited to cases where there are no eye-witnesses to the accident" (citing cases).

But owing to the circumstances of this particular case, the Court held that the error was not prejudicial.

Inference of Agency from Ownership of Car

The oft-raised question of whether ownership of an auto raises a presumption that the driver was acting as the agent of the owner is again discussed in *Wilson v. Droege,* 63 C. A. D. 1466. The Court announces the rule to be as follows:

1. The ownership of a car by one person, and its operation by another, gives rise merely to an inference that the owner *permitted* the driver to use the vehicle (page 1469).

2. But no inference of agency is created by the facts that the defendant owned the offending vehicle and that he permitted the driver to use it (page 1470).

3. Where, however, the vehicle is owned by the defendant, and the driver is the defendant's employee, an inference arises that the driver was acting within the scope of his employment at the time of the accident (page 1470).

The language shown in paragraph "2" above, however, seems to be in direct conflict with that used in *Strasburger v. Prescott,* 64 C. A. D. 171, at 173: "The law is established that an inference of agency arises between the owner of a motor vehicle and the driver from the fact of ownership."

In fact, this whole question of what effect the proof of ownership of the offending car has upon the liability of the owner is in a state of confusion, as is well illustrated by the two cases last cited above. In a case involving this question, therefore, the careful lawyer will do well to brief the subject fully; and will find the following to be some of the cases bearing on both sides of the subject:

190 Cal. 246
196 Cal. 279
81 C. D. 151
35 Cal. App. 288
39 Cal. App. 738
55 Cal. App. 397
56 Cal. App. 593
59 Cal. App. 86
72 Cal. App. 57
81 Cal. App. 142
85 Cal. App. 31
40 Cal. App. 758
41 Cal. App. 323
41 Cal. App. 739
42 Cal. App. 209
49 Cal. App 789
89 Cal. App. 275
89 Cal. App. 511
62 C. A. D. 378
63 C. A. D. 1466
64 C. A. D. 171

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Opinions on Problems of Professional Ethics

In order that all the lawyers of Los Angeles County may have the benefit of the opinions of the Legal Ethics Committee of the Los Angeles Bar Association, given in response to specific requests for advice in actual situations, THE BULLETIN presents here some of the more important of these opinions. For obvious reasons the names of the persons requesting the advice of the Committee, and to whom answers are directed, are omitted. Other opinions will be printed from time to time.

ADVERTISING: A novel proposition was submitted to the Committee by a member of the bar on the subject of advertising by the Bar itself. The question is put thus:

"* * * We are advised, and, I believe, properly on the whole, that it is better if our canons of ethics prohibit personal advertising. Would there be any objection to dignified advertising coming from the Bar itself? Suppose we were to submit an interesting, brief and readable pamphlet, the printing of which the Bar would finance, to be distributed by lawyers to their clients through mail and other channels. calling attention to the real purpose of the Bar in this endeavor and at the same time pointing out the superior advantage to a member of the public of "consulting your lawyer first," or some similar program. We would suggest the impossibility of eliminating advocates under any system of government. We could suggest the desirability of maintaining an independent body of men and women free from financial or other entanglements, ready to serve individual members of the public in confidential matters where it would probably be unsafe or inadvisable to rely upon corporate responsibility. We could point out that money and financial strength is not in itself a substitute for skilled personal and partisan endeavor on behalf of one in need of service."

OPINION:

It is the opinion of the Committee that to follow the suggestions contained in the above quotation would be unwise and not in consonance with the traditions of the Bar of California; and, in fact, that such form of advertising would be in direct contravention of the very canons of ethics promulgated for the guidance of the profession in its conduct. We believe that these canons apply to any collective number of the members of the bar with the same force as to an individual member thereof; and that any inhibition therein contained against the doing of a certain act by an individual member, applies to an extent, to say the least, to our Bar Association itself.

It might be profitable at this point to call attention to these portions of the canons of ethics the profession is bound to observe on the subject of edvertising.

The American Bar Association in August, 1908, adopted certain Canons of Professional Ethics, among which is the following:

"The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. * * *"

The present Canons of Ethics of the Los Angeles Bar Association were adopted in the year 1917, and contain the same admonition against advertising by the profession as contained in the foregoing rule of conduct.

FEES—ETHICAL CONDUCT: This rather involved but interesting problem was submitted to the committee:

A resident of Los Angeles County died, leaving a widow who found it necessary to employ an attorney in the administration of the estate. She sought the advice of "E" who recommended "M" as attorney. At the first meeting the widow inquired what the attorney's fees would be and in reply the attorney stated that the fees in probate matters were set by Court. The attorney was informed by someone present that a son-in-law of the widow had approached a certain attorney in Los Angeles as to the amount of these fees and upon being told that the estate would approximate $80,-

000.00, informed the son-in-law that the fees would amount to $1700.00, and that he would split the fee with the son-in-law if the business was placed in his office. The widow was then informed that the attorney did not believe in splitting or cutting fees, and that he believed the fees fixed by Court were fair and reasonable, and that such fees were computed on the size of the estate. The widow said she would like to think the matter over and for him to call her on the telephone that evening. Upon telephoning he conversed with a daughter, who informed him that her mother had decided to employ him and requested that he meet them at the bank the following day to read the will and talk over the business, which request was complied with by the attorney.

The attorney proceeded to administer the estate and, in addition, has filed a petition to terminate certain joint tenancy property in favor of the widow. All that remains to be done is the filing of the first and final account, report and petition for distribution, together with the few minor details relating to taxes. On occasions the widow inquired of the attorney what the fees would amount to, but since the appraisement had not been returned he told her he could not tell exactly but that it would be between $1700.00 and $1900.00. The only statement the widow made in reply was that the fee seemed "pretty high."

At this point enters the son-in-law again, who has accused the attorney of having refused to tell the widow what his fees would be; that the court did not set the fees in probate matters, and that it was a matter that could be and ordinarily was settled between the parties; that he had taken the matter up with three or four of his attorney friends, receiving the advice from them that fifty per cent of the fee set out in the statute would be the correct amount to charge in this case, one stating that $1,000.00 would be the proper fee. The son-in-law made certain threats, which it is not necessary to relate.

We are asked to pass upon whether or not the attorney's conduct has been unethical. It is our unequivocal opinion that there has been no unethical or unprofessional conduct on the part of such attorney; but that on the contrary he is eminently within his rights in maintaining his position in the matter of these fees.

MARK A. HALL

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Lawless Enforcement of Law

REPORT OF COMMITTEE TO SECTION OF CRIMINAL LAW AND CRIMINOLOGY OF AMERICAN BAR ASSOCIATION. MOVEMENT HAD ITS INCEPTION IN THE LOS ANGELES BAR ASSOCIATION. EXHAUSTIVE RESEARCH SHOWN. ACTION AT 1931 SESSION ANTICIPATED

There is presented here the text and notes (the latter much abbreviated) of the report made at Chicago, last summer, to a section of the American Bar Association. A few additions to the notes are enclosed in brackets. At the end of the report there is shown the resolutions submitted by the Committee, which are to be acted upon at the 1931 meeting. It is in just recognition of the work of one of our own best known members, to add that this report and the appointment of the Committee that made it, are among the consequences of the creation by Hubert T. Morrow, while president of the Los Angeles Bar Association, of a Committee on Constitutional Rights. The Committee is composed of the following: Edgar W. Camp, Andrew A. Bruce, Oscar Hallam.

(Continued from February Bulletin)

Fifth: Our criminal procedure in the courts is cumbersome, slow, lax, uncertain. The paroling and probationing of convicted men, while a valuable adjunct to criminal procedure, is in practice generally unscientific, unsystematic and unsatisfactory. The police are discouraged by the poor results often following their excellent work in detection, investigation and capture. They take themselves seriously, perhaps too seriously, so as to lose their sense of proportion and their saving sense of humor; coming to think that the weight and fate of society is on their shoulders, and that it is necessary, so far as possible, to take the law into their own hands. We may hope that in time the criminal court procedure will improve so as to deserve the confidence of the police.

Police Illiterate or Untrained

But while these adverse conditions are among the reasons for the adoption of desperate and lawless remedies by the police, there are certain other reasons.

Our police, and particularly the detectives, are too often ill-trained or untrained. Standards of intelligence and knowledge are low; with few exceptions no course of instruction or training is required or provided. The pay and the conditions of the service do not draw to it a high grade of men. To force confessions and admissions by some form of the third degree is the easiest way, especially for detectives not especially intelligent and not too keen for work. As a civil officer in India said to Sir James Stephens some sixty years ago, "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."[34]

V.

What Are the Objections?

What are the objections to these methods? Of course, the first that comes into one's mind is that they are unlawful.[35]

34. See Fosdick's American Police Systems, chapters V to XI, especially chapters VII, VIII and XI. [See Lavine's "The Third Degree," cited in note 9 *supra*, and especially his second chapter "The Cop."]

35. Albert Bushnell Hart, in Current History, April, 1930, page 117 (118):

"The third degree is involuntary servitude worse than that of the worst plantations under the old slavery system because applied to free men and women. The whole system is based on the fallacious idea that people under torture will tell the truth."

"The treatment of persons who are innocent but who will not or cannot testify is another phase of the third degree. A man or woman who has influence is not likely to be molested because the perpetrators of the third degree will be afraid of getting themselves into trouble. Thus it is the weak, poor and friendless who are thus bullied and maimed."

"The existence of such a system not only illegal but contralegal in a civilized community is a part of a general breaking down of our machinery for detecting and punishing crime."

Wigmore on Evidence, in section 2250, gives a very interesting history of the privilege against self incrimination. Section 2251 is an ample consideration of the policy of this privilege.

People v. Rogers, 303 Ill. 578, 136 N. E. 417 (1922):

"A certain article in a newspaper which was brought into the case confirmed a preconceived

(Note Continued on Next Page)

But is this objection sound? It is undoubtedly valid to the extent that the use of lawless means in enforcing law does itself beget lawlessness.[36]

It is a form of lynch law and in its essence anarchic.[37]

But if the use of these means is on the whole beneficial, if they are necessary to the peace and good order of society, then the law itself should be amended so as to permit and regulate.

Police, sheriffs, and many state's attorneys believe these practices are a necessity. Mr. Larson, in the article cited in note 31, *supra,* says that he has frequently questioned American detectives and others concerning the third degree, and their replies have invariably agreed in substance, namely, that necessity knows no law, that the end justifies the means, that proof of the pudding is in the eating, and that it is Hobson's choice. The officials are honest, are doing their best to serve the state. When they hold a man for days in the sweat box or a cold cell without bed or chair in order to extort a confession, they are not acting by malice, or any ill will toward the prisoner. On the contrary, they sincerely believe that what they do is for the best interests of the state, is a social service, and they are grieved and shocked when one suggests that such actions are heinous.

In order to obtain a change in the current methods it will be necessary to show that the third degree and all that goes with it is obnoxious on other ground than illegality. Americans do not seem to care much whether procedure is lawful or unlawful, if only it get quick results. It has been objected to confessions obtained by unlawful means that they are likely to be false. It is true that now and then a confession afterwards shown to be false has been extorted by use of the third degree, and doubtless other confessions so obtained were false, but we can not say, and in fact have no reason to believe that any considerable percentage of the objectionable confessions are false, even those

(Note continued)

opinion of this Court, or at least of several members thereof, that it has been the practice of the Chicago police in a number of cases to extort confessions from suspects arrested by them by means of what is called the sweating process, the meaning of which is well understood without further explanation. This sweating process has no doubt been accompanied in some cases by violence or beating of the suspect into making a confession * * *. The practice of punishing a suspect by blows or other violence when he otherwise refuses to confess is a violation of the criminal law itself, and renders a policeman subject to criminal prosecution for such conduct. It is just as much the duty of a state's attorney to prosecute an officer who is charged with violating that law as it is to prosecute any other man charged with crime. * * * We can conceive of no more beastly a criminal practice than the securing of convictions in the manner indicated. No self respecting citizen and certainly no law abiding citizen can stand for such practices after he has well studied the question. It is the most dangerous and most uncivilized practice imaginable to allow the police to go out and arrest a man or boy on the mere suspicion that he had committed a crime and for days subject him to the sweating process and to violence until he finally gives up and confesses in order to escape the torture to which he is being subjected. The guilt or innocence of such a suspect would necessarily be determined by the first guess of the police as to who was the real criminal. And if the police make a mistake, conviction of innocent men and boys would necessarily result from such practice."

The newspaper article in question read as follows:

"When a Chicago police official yesterday heard Judge Fitch of the Criminal Court had ruled he would not allow confessions of prisoners to be introduced as evidence in trials he said 95 per cent of the work of the department will be nullified if the policy is permitted to prevail. The judge explained he was acting in accordance with a Supreme Court ruling given in the case of Nick Viano hanged recently for murder. The Court held that confessions obtained after long mental and physical fatigue should be construed as having been forced. It was pointed out by the police official that few if any prisoners confess except after lengthy examination. We are permitted to do less every day, continued another official. Pretty soon there won't be any policee department."

[In People v. Barbato, 254 N. Y. 170 (1930), 172 N. E. 458, the opinion says:

"It has been said: 'One is driven to the conclusion that the third degree is employed as a matter of course in most states and has become a recognized step in a process that begins with arrest and ends with acquittal or final affirmance.' 43 Harvard Law Review, 618. The practice in England seems otherwise. Statements made after arrest in answer to questions by police officers, if legal evidence (as to which the law is not settled) are cautiously received. Ibrahim v. Rex (1914) A. C. 599. Lawless methods of law enforcement should not be countenanced by our courts even though they may seem expedient to the authorities in order to apprehend the guilty. Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime. If torture is to be accepted as a means of securing confessions, let us have no pretense about it, but repeal section 395 of the Code of Criminal Procedure and accept all evidence of all confessions however obtained, trusting to the jury to winnow the true from the false. As long as the section remains in the Code, the courts are bound to give as full protection to an accused as the evidence warrants."]

36. See Cliff Maxwell's article "The Crook and the Bull," in North American, December, 1929, p. 641.

"A conviction secured by the brutal and criminal practices already mentioned is not in the interest of putting down crime, but quite to the contrary. Its natural tendency is rather to increase crime and absolute disrespect for law and the courts."

People v. Rogers, 303 Ill. 578, 136 N. E. 417 (1922).

In May, 1929, the chief of police of Los Angeles, Cal., wrote:

"In my humble opinion, after 17 years of enforcing the law, there are three great factors in this country that have a tendency to beget lawlessness * * * These factors are: * * * 3. Lawless methods of law enforcement."

The chief had in mind a sentence from a then recent address by Attorney General Mitchell:

"Nothing has a greater tendency to beget lawlessness than lawless methods of law enforcement."

37. "Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Mr. Justice Brandeis, dissenting in Olmstead v. U. S., 277 U. S. 438 (485) 48 S. Ct. 564, 72 L. Ed. 944 (1928). The case did not involve any form of the "Third Degree."

extorted by the most brutal means. Usually the police have wrung the confession from the man who was in fact guilty.

Holding incommunicado is objectionable because arbitrary—at the mere will and unregulated pleasure of a police officer. It often amounts to an admission that the man was arrested without substantial evidence of his guilt. It is unnecessary to effective criminal procedure, for in England and Canada there is no such holding. We do not notice that in states where the practice most prevails the laws are better enforced than in those which depart less from lawful procedure. The practice creates enmity toward the government on the part of those arbitrarily held, their relatives, friends and associates.[38]

"Third Degree" Is Obnoxious

The use of the third degree is obnoxious because it is secret; because the prisoner is wholly unrepresented; because there is present no neutral, impartial authority to determine questions between the police and the prisoner; because there is no limit to the range of the inquisition, nor to the pressure that may be put upon the prisoner. It is true that proceedings before grand juries are supposed to be secret, but a witness brought before the grand jury may refuse to answer and the jury can compel answers only by calling on the court to punish for contempt. It is for the court then to determine whether or not the question is one which the witness ought to answer. But in proceedings under the third degree the questioner himself determines whether the question should be answered and himself determines what means shall be used to compel an answer. Not only that, but if an answer is not to the questioner's liking, he may use any means that he chooses to compel a different answer.

What has been said supports also the objection that third degree methods are wholly arbitrary.

That they are unnecessary is apparent when we consider the entire absence of anything approaching such procedure in Canada or England.[39]

Probably the third degree has been a chief factor in bringing about the present attitude of hostility on the part of a considerable portion of the population toward the police and the very general failure of a large element of the people to aid or cooperate with the police in maintaining law and order.[40]

VI.

Legalized Examination Suggested.

Various remedies and cures have been proposed. The New York committee, to whose report we have so often referred, says that the third degree would cease to be used, if police were compelled to produce their prisoner at once after arrest before the court.[41]

It has been proposed that in lieu of the

38. "The Crook and the Bull," North American Dec., 1929, p. 641;
Am. Inst. Cr. Law and Criminology, August, 1925, Vol. 16, U. S. 2, p. 219;
On the Witness Stand, Hugo Munsterberg, pp. 73 *et seq.*

39. The French have a method regulated by law for examination of the accused before trial. But even this is said to result often in a poorer case for the prosecution than is produced by the English method.
Zechariah Chaffee, Jr., in New Republic, Nov. 12, 1924, Vol. 40, p. 266.

40. Zechariah Chaffee, Jr., in New Republic, Nov. 12, 1924, Vol. 40, p. 266, says that even if confessions extorted by grilling were usually true and furnished satisfactory proof of guilt, the use of such a method should be rejected because of its injurious effect on the public. "If a government is to retain the devotion and confidence of the people, it must not violate their sense of decency. Inquisitional methods are bound to leak out, perhaps in exaggerated form. The men who are convicted thereby are believed by a considerable number of people to be innocent. It is not enough that people should get justice, they must believe that they are getting justice. They will not so believe if conduct by the police like that in the Wan case (266 U. S. 1) is a frequent occurrence."
From the Chicago Tribune of July 5, 1927, we condense:
Chief of Police Hughes says that he does not countenance the police mistreatment of innocent citizens, but that crooks will not get gloved treatment. One chief after another uses about the same formula when he talks of crime. No one did it better than Joe Kipley thirty years ago. They are all rough on the criminals and are chasing them out of town. It isn't observable that there are any fewer toughs on the street toting pistols, the possession of which is supposed to be good for a stretch.
There is a pretty general acceptance of the theory that the police beat up a suspected man, if he has a criminal record, to get the facts out of him. It isn't a very pretty theory and it doesn't work so exceptionally well. A police force brutalized in its relation to the public loses respect, influence, and credibility. Citizens who experience mistreatment, ranging anywhere from insults to blows, nurse their grievance and they have no use for a copper.
That is precisely the wrong relation of police and public. The Chicago police cannot even show results from their methods.
The rough work becomes a habit. A chief thinks he has done his job if he talks as a whiplash sounds. We print it, and as far as the crooks are concerned that's about all there is to it. Gradually violence is being used as a substitute for intelligence and a short cut for real detective work. It is not fooling as many people as it used to.

41. Report Pamphlet No. 1, *supra.*
Along this line an alert public defender can accomplish something. James H. Pope, formerly public defender in Los Angeles, in a letter dated March 2, 1929, says that it was his custom while police court defender to visit the jail each morning and give an opportunity for every prisoner in jail to have an interview. This did not reach those who were incarcerated in the so-called felony cell. To reach them he secured an order to have delivered to him each day a duplicate copy of the jail sheet. Each day he prepared a list of prisoners who had been detained 48 hours or longer, and delivered it in person to the captain in the morning. At noon, or early afternoon he called at the captain's office to learn the disposition of the cases. In cases of unreasonable delay, he gave notice that petition for a writ of *habeas corpus* would be filed the next morning.

present unregulated inquisition called the third degree there be substituted a legalized and carefully regulated examination of the accused in the presence of his counsel and under the control of a judge. The accused would not be compelled to answer, but his refusal would be subject for comment at the trial and for consideration by the jury.[42]

On the other hand, it has been suggested that no statements made by the accused to police or sheriff's officers be admitted in evidence. But the more skillful users of the third degree avoid offering those statements by having them repeated in apparently voluntary form to the state's attorney.

It has been suggested that the state's attorney have the right at the close of his case to call the accused to the witness chair and examine, subject, of course, to the right to refuse to answer—the jury being at liberty to draw inferences from the refusal.[43]

It has been proposed that delay in bringing a prisoner into court, abuse of prisoners by beating, whipping, etc., be made a felony instead of a misdemeanor as at present. One of our most persistent illusions is that obnoxious behavior can be stopped by calling it a felony instead of a misdemeanor. In fact, the contrary is often the result. It will be time enough to test the efficacy of such a law after proving that the enforcement of the penalty for the misdemeanor is ineffective. In fact, we have never succeeded in enforcing the misdemeanor statutes.[44]

Rules Adopted in England

In England some years ago the department of government in charge of police asked the judges to formulate rules covering the questioning of suspected or arrested persons. The judges complied. Rules were formulated and promulgated. They are not laws, and do not have the force of laws, but are the rules made by the authorities in charge of police for the conduct of the police, and are obeyed by the police as any well disciplined body of men obey the orders of commanders. So neither the third degree nor anything approaching it exists in that country, not because England has more or more stringent laws on the subject than we have, for such is not the fact, but because of regulations voluntarily adopted by the governmental bureau in control of the police.[45]

42. Methods of Obtaining Confessions, *supra*, note 29; Report California Crime Co., State Printing Office, Sacramento, 1929, at p. 102;
Report Pamphlet No. 1, supra, note 8:
"For many years there has been a widespread feeling that the guarantee against self-incrimination was being unwarrantably used for the obstruction of justice. There are many serious students of present criminal conditions who believe that a departure is required from our fundamental provision against compulsory self-incrimination, and that the Constitution should be so amended as to permit the arraignment of an accused before a magistrate who may compel him to answer questions concerning the offense with which he is charged regardless of whether such questions incriminate him or not,"
referring to an article by Judge Knox, 74 Pa. Law Review 139.
The committee note on page 22 that a writer in the February, 1928, number of the Criminal Law Review recommends such Constitutional amendment as to permit the compulsory examination of the defendant on his trial coupled with statutory provisions prohibiting, under severe penalty, the interrogation of a prisoner by police officials and rigidly excluding from such evidence the result of such interrogation no matter how conducted—or, as an alternative to such prohibition of all interrogation before trial the providing of an immediate preliminary hearing in which the defendant might be subjected to interrogation, never by the magistrate but by the prosecuting officer, with the right to the accused to have counsel present and participate in the examination, with the added provision that there should be no examination except of one already charged with a specific offense, and that the examination should be limited to that offense, no fishing expedition to find out whether crime has been committed and if so by whom, being permitted.
See also quotation from an address by Judge Sloss in People v. Loper, 159 Cal. 6, 112 p. 720 (1910).

43. See p. 22 of Report Pamphlet No. 1, *supra*.
In Harvard Law Review, Vol. XI, beginning at page 220, is an article by Lowell, who suggests that the rule against self incrimination be modified so as to permit examination of the accused at the trial. He says if the change is made, the examination of the prisoner should be strictly limited. It should not be made until the rest of the evidence for the prosecution has been put in, and the government should be allowed to offer more evidence only to rebut new facts brought out by the prisoner or his witness. The questions should relate directly to the offense charged in the indictment and not suffer to have the latitude ordinarily permittted in cross-examination. "Above all, the protection of the prisoner against examination previous to the trial should be rigorously maintained." "Any preliminary examination of the accused, however conducted, offers in the nature of things a great temptation to oppressive and cruel treatment and to prosecutions on insufficient grounds, while it tends to lessen incentives to independent and laborious search for evidence and hence to a thorough investigation of the facts."

44. See People v. Frugoli, 334 Ill. 324, 166 N. E. 129 (1929) quoting Sec. 161 of the Criminal Code, which is manifestly ignored with impunity by the police. Wharton's Crim. Evid. 10th Ed., Vol. 2, Sec. 622 (note).
In Baughman v. Commonwealth, 206 Ky. 441, 267 S. W. 231 (1924) the Court said: "Defendant was arrested about 2 o'clock in the morning. One of the deputy sheriffs who was along was guilty of some very brutal treatment of defendant inflicted during the course of interrogating him about the crime, and for which the maximum punishment applicable to that conduct should be meted out to that officer." We have learned that no effort was made to mete out any punishment to the officer.
"Nothing is more attractive to the benevolent vanity of men than the notion that they can effect great improvement in society by the simple process of forbidding all wrong conduct, or conduct which they think is wrong, by law, and of enjoining all good conduct by the same means." James C. Carter in Law; Its Origin, Growth and Function, New York, 1900, p. 221.

45. See p. 21 of Report Pamphlet, No. 1, *supra*, note 8.
The following is from Appendix 8 of Report of Royal Commission referred to later in this note:
"Extract from an Address to Police Constables on Their Duties by the Late Lord Brampton (Mr. Justice Hawkins).
"Questioning, When Permissible.
"When a crime has been committed, and you are engaged in endeavoring to discover the author of it, there is no objection to your making inquiries of, or putting questions to, *any person* from whom you think you can obtain useful information. It is your

(Note Continued on Next Page)

Unlawful searches of dwellings would be much less frequent if all courts would adopt the rule of the federal courts excluding from evidence articles obtained in such searches.[46]

Public Opinion Controls

After all, it is public opinion which controls. If whipping negro prisoners were unpopular in the south, southern sheriffs would not practice it to the peril of their re-elections. If beating up prisoners to make them confess were distinctly unpopular in Los Angeles, New York City, or Chicago, the police commissioners, or the mayor, or whatever authority may select and control chiefs of police, would see to it that the practice be abolished.

If a police commission should order, as the English authorities did some years ago, that no policeman or constable ask his prisoner any question or enter into any conversation with him, the police will obey. If the police commission will order that

(Note Continued)

duty to discover the criminal if you can, and to do this you must make such inquiries, and if in the course of them you should chance to interrogate and to receive answers from a man who turns out to be the criminal himself, and who inculpates himself by these answers, they are nevertheless admissible in evidence, and may be used against him.

"When Not Permissible.

"When, however, a constable has a warrant to arrest or *is about to arrest a person* on his own authority, or has a person in custody for a crime, it is wrong to question such person touching the crime of which he is accused. Neither judge, magistrate nor juryman, can interrogate an accused person—unless he tenders himself as a witness, or require him to answer questions tending to incriminate himself. Much less, then, ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody. On arresting a man a constable ought simply to read his warrant, or tell the accused the nature of the charge upon which he is arrested, leaving it to the person so arrested to say anything or nothing as he pleases. For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong. * * * *He ought not, by anything he says or does, to invite or encourage an accused person to make any statement, without first cautioning him that he is not bound to say anything tending to criminate himself, and that anything he says may be used against him.* Perhaps the best maxim for a constable to bear in mind with respect to an accused person is *Keep your eyes and your ears open, and your mouth shut.* By silent watchfulness you will hear all you ought to hear. Never act unfairly to a prisoner by *coaxing* him by word or conduct to divulge anything. If you do, you will assuredly be severely handled at the trial, and it is not unlikely your evidence will be disbelieved."

In a letter written in September, 1927, by Mr. E. A. Godson, Barrister at Law, and Sir Thomas Hughes, K. C., it is said:

"As regards questioning of accused persons by police officers, a certain latitude is allowed police officers whilst they are making inquiries of a suspected person about a crime until they have decided to arrest that person. But after they have decided to arrest him or he is in custody or on bail awaiting trial, it is a definite and well recognized rule that no further questions are to be asked of him, and furthermore no voluntary statement which he may make will be admitted as evidence against him at his trial unless at the time of making it he is duly cautioned that what he is going to say may be used in evidence at his trial. The police therefore expend their energies in gathering the extraneous evidence against the prisoner rather than in trying to extract a confession or trick the prisoner into making one, for they know that it will not be admitted in evidence. It will be seen, therefore, that discouragement of the practices which you allege in the U. S. A. must come from the tribunals, for it is only human for a keen policeman to exercise all his ingenuity in gathering evidence by confession or otherwise which a tribunal will accept."

A commission issued by the King of England, August 22, 1928, directed to eight persons, to consider the general powers and duties of police in England and Wales, etc.

The commission made a unanimous report in March, 1929, entitled "Report of the Royal Commission on Police Powers and Procedure." This is a printed document of 161 pages, to be obtained at any stationer's in England at a moderate price. It should be studied by everyone who is interested in Enforcement of Law in the United States.

Space does not permit an extended review of this important document, but we quote verbatim a few of the "Principal Conclusions and Recommendations," beginning at page 113:

"(xli) A person arrested should, in every case be brought straight to the station officer for the preferment of the formal charge.

"(xliv) Any person who is in fact under restraint, and knows that he is under restraint, should be treated as being in custody for all purposes.

"(xlviii) A rigid instruction should be issued to the Police that no questioning of a prisoner, or a "person in custody," about any crime or offense with which he is, or may be, charged, should be permitted. This does not exclude questions to remove elementary and obvious ambiguities in voluntary statements, under No. (7) of the Judges' Rules, but the prohibition should cover all persons who, although not in custody, have been charged and are out on bail while awaiting trial.

"(liv) All persons in custody, on arrival at the Police station, should be allowed facilities to consult with their legal advisers, and also their friends except when the interests of justice forbid."

46. For a fuller statement see "Historical Survey of the Law of Searches and Seizures," by Lewis M. Andrews, in Law Notes for June, 1930, Vol. XXXIV, No. 3, p. 42, from which this note is taken.

The United States Supreme Court, all of the subordinate federal courts and fifteen of the state courts of last resort have followed the federal rule as announced in Boyd v. United States, 116 U. S., 616, 29 L. Ed. 746, 6 Sup. Ct. 524 (1886) and subsequent cases, and refuse to admit evidence obtained by illegal search and seizure. The fifteen states, above mentioned, which have adopted the federal rule are Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, Oklahoma, Oregon, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

Three other states, by reason of strong dicta contained in their decisions, indicate adherence to the federal rule. These are Florida, Idaho and New York.

In all federal and state courts where the exclusion doctrine is in force, the general rule holds that defendant must apply for a return or suppression of the evidence *in advance of the trial,* provided defendant has knowledge of the seizure.

Six states, while not rejecting the federal rule in its entirety, have done so in so far as the rule applies to intoxicating liquors, and have held that there is no property right therein. Consequently, a defendant has no right either to a return or suppression of such evidence, and seizure of such liquor is not a seizure of defendant's property. These states are Ohio, Delaware, Minnesota, North Dakota, Pennsylvania and South Dakota.

The federal rule has been squarely considered in twenty-four states, and been rejected on the ground that the court will consider the evidence itself, and not the means by which procured. These states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire.

In Weeks v. U. S. (1914) 232 U. S. 383, 58 L. Ed. 652 the federal rule is said to put the federal courts and officials:

"in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects,

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persons arrested be taken before the magistrate at the first opening of court after the arrest, or as soon thereafter as physically practicable, that order will be obeyed. But the police commissioners make such rules and orders as they think meet the sense of their public. So there is little to hope for in more law of a merely negative or repressive sort. We have laws aplenty for securing such constitutional guarantees as those against deprivation of life, liberty or property without due process of law, prohibiting unreasonable searches and seizures, declaring that a man shall not be compelled to incriminate himself, and the police will respect these guarantees whenever specifically ordered so to do by their superior officers; and these will enter such orders only when they feel the steady pressure of sober, determined public opinion. Let no one think that it will be a short or easy task to bring about in the United States any such sober and determined public opinion.[47]

The newspapers reflect public opinion or rather the prevailing emotional state of the public; and, reflecting that, most newspapers are quick to applaud the most outrageous lawlessness of the police if it gets the desired results, and venomous in denouncing an officer who uses the same methods on one whose situation or personality happens to touch the sentimental chord. Neither Babbitt, nor Main Street, nor the newspaper seems to give a thought to the lawlessness of the act when the immediate results are gratifying.

Existing conditions were only too well summed up by Albert Bushnell Hart last August, who wrote (in Current History, August, 1929):

"A very large number of American police officials . . . have established, without law and in the teeth of law, the third degree, which is simply a system of judicial torture practiced not even on criminals, but on persons suspected of crime. The Supreme Court of the United States recently quashed the conviction of a Chinese, who was convicted of murder upon evidence thus obtained; but the practice goes on constantly and it is clear that the American people like it, because so little effort is made to put it to the ban."

A few months ago policemen in a certain city made two egregious blunders in breaking into houses without warrants. The newspapers denounced the act, but only because the wrong houses were raided and not because of the lawlessness of entering without a warrant. Then the police commissioners made an order that the officers obtain search warrants before breaking into dwellings. Whereupon a large and potent faction of the public at once urged the revocation of that order.

Los Angeles Bar Association's Work

The condition is serious but not hopeless. A committee of the Bar Association of Los Angeles is able to report that steady work for two years in protesting to police commissioners, in publishing the facts in regard to local violations of rights of arrested men, in addresses wherever assemblies wished to learn the facts, has resulted in a betterment of conditions in that city. Pitiless publicity will accomplish much. It is not impossible that in time and with constant labor the iniquitous practice of the secret inquisition may be brought to an end. At least the American Bar Association and the State, City and County Associations ought to be able to shame their own members, the prosecuting attorneys, from longer participating in these inquisitions and other lawless acts, from longer conniving and winking at them and utilizing the results to get easy convictions.

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against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal constitution, should find no sanction in the judgment of courts."

47. "Revision of the statutes would be of little use under the present system inasmuch as this particular invasion of liberty is already contrary to all the principles of American criminal jurisprudence. What is really needed is that every man or woman who has political influence should, whenever a case of the third degree comes to his knowledge, denounce it with such an outcry that people will realize the danger to themselves and their descendants of a practice which is nothing less than a qualified type of slavery."

Albert Bushnell Hart in Current History, April, 1930, p. 117.

Report Pamphlet No. 1, *supra*, note 8, says at page 22, that there are many who believe that the evils complained of are due solely to laxity in the enforcement of existing statutes, that such evils would cease at once if every arresting officer knew that the slightest use of unnecessary violence upon a prisoner in custody would result in immediate dismissal from the force and in prosecution as well, and if every prosecuting official knew that instant dismissal from office would follow the use or countenancing by him of any coercion for procuring a prisoner's confession, and that crime can be effectively prosecuted and restrained without constitutional or legislative change by strict conformity to existing laws.

We venture to recommend that the American Bar Association declare that examinations of persons under arrest except in the presence of the prisoner's attorney or the public defender are contrary to sound criminal procedure and are an obstacle rather than aid to the maintenance of law and order; that the Association urge all police commissioners and others in authority over police to make and enforce rules forbidding all such secret examinations, and requiring police to bring arrested persons into court as soon after arrest as it is physically practicable so to do.

We would recommend that laws and rules be changed so as to permit the prosecution to comment on the fact that a defendant did not take the stand as a witness and so as to allow the jury to draw reasonable inferences from the fact. This has been the law in England ever since the defendant was first permitted to testify. From passages in the recent biography of Marshall Hall, "For the Defence," it appears that the result of the rule has been to make it very dangerous for a defendant not to take the stand. In New Jersey the law is the same as in England. Suggestion for general adoption of such a rule has often been made; see an article by Zechariah Chaffee, Jr., in New Republic, Vol. 40, p. 266, No. 12, 1924. The New York committee, to whose report we have several times referred, notes the more drastic suggestion that the prosecution at the close of its case have the right to call the accused to the stand—of course he would have the right to face the jury and refuse to testify. The same suggestion was made by Lowell in Harvard Law Review, Vol. XI, p. 220. We recommend the English rule as less drastic but effective. We are not sentimentalists; we don't believe in "coddling" men accused of crime. We stand for swift and vigorous prosecution and oppose the practices which we have pointed out not merely nor chiefly because they are unlawful, but because in the long run they do much more harm than good.

We cannot expect the immediate abandonment anywhere of all lawlessness in the enforcement of law. It will come a step at a time and the states and cities will not proceed at an equal pace; some states and some cities are much in advance of others. But by continued demand for observance of law by its officers, by continued investigation and ventilation of the facts, a public opinion may gradually be formed that such lawlessness does not pay; that it does more harm than good. Such an opinion once established, the powers that be will react to the stimulus and find better weapons in their unending battle against crime.

EDGAR W. CAMP,
ANDREW A. BRUCE,
OSCAR HALLAM,
Committee.

The undersigned would also recommend that the federal rule against use in evidence of things taken by officers in unlawful searches be adopted by the states that do not already follow it.

EDGAR W. CAMP.
ANDREW A. BRUCE.

One wishing to pursue the subject further might well consult Kuhlman's Guide to Material on Crime and Criminal Justice, published by F. W. Wilson & Co., New York, 1929, pages 278 and 269. To his lists may now be added reference to the latter part of Mr. Newlin's address, printed in Reports of American Bar Association, Vol. 54, see page 183; Lawless Enforcement of Law, same volume, page 564; The Crook and the Bull, North American Review, Dec. 1929, page 641; The Report of the Royal Commission, see *infra*, note 45; Harvard Law Review, Vol. 43, page 617; New Republic, March 19, 1930; Law Notes, June, 1930, Vol. XXXIV, page 42. [Lavine, "The Third Degree," Vanguard Press, N. Y., 1930.]

THE COMMITTEE'S RESOLUTIONS.

After submission of the foregoing report the committee was directed to present resolutions. The following were presented, and were laid over to come up for action at the next annual session:

RESOLVED, that the Section of Criminal Law and Criminology recommend to the American Bar Association adoption of resolutions as follows:

1. That persons taken into custody ought to be brought before a magistrate as soon as physically practicable.

2. That every person taken into custody be given opportunity forthwith to employ counsel and to confer with counsel.

3. That every person taken into custody be permitted at reasonable hours to be visited by relatives.

4. That no police officer or detective should be allowed to interrogate a person in custody except in the presence of the prisoner's counsel or the public defender

and then only in case the prisoner says that he wishes to make a statement.[1]

5. That examinations of persons in custody by police or detectives not in the presence of prisoner's counsel or the public defender are unlawful.

6. That police commissioners and others in authority over the police are urged to make and enforce rules in accordance with the foregoing resolutions.

7. "That nothing has a greater tendency to promote crime than lawless methods of law enforcement."[2]

8. "That the remedy for the ills which afflict the administration of criminal justice, whatever that remedy may be, will not be found in measures which violate law."[3]

9. That the extortion of confessions or admissions by prolonged secret interrogation, by depriving the prisoner of opportunity to sleep, depriving him of food or drink, holding him incommunicado or by any of the methods of the so-called "third degree" are abhorrent to all who value the dearly purchased liberties declared in our Constitution, and are indefensible upon any ground.

10. That state's attorneys and other prosecuting officers ought, as officers of the law and of the courts, to be alert to protect arrested persons in their constitutional rights and ought never to take part in or to countenance the holding of men incommunicado or any attempt by secret inquisition or other lawless means to get confessions or admissions.

11. That by law it should be permitted to the prosecution to comment to the jury on the fact that a defendant did not take the stand as a witness; and to the jury to draw the reasonable inferences.

12. That the federal rule against the use of evidence of things taken by officers in unlawful searches ought to be adopted by those states that do not now follow it.[4]

(Note 1.) "Compulsory inquisitorial examination of one awaiting arraignment for the purpose of forcing a confession from him differs only in degree and not in illegality from physically assaulting him for the same purpose." Report Pamphlet No. 1 of the Association of the Bar of the City of New York, Annual Report of the Committee on Criminal Courts, etc., for 1927-8.

"The familiar principle that arresting officers have no power or authority other than to arrest and safely keep a person charged with an offense until the matter can be inquired of in a decent and orderly fashion prescribed by law has never prevailed in practice. The arresting officer has always assumed that it is within his power to institute a summary inquisition to extort from the party suspected a statement that would confirm his suspicion." Wharton's Criminal Code, 10th Ed., Vol. 2, Sec. 622 (1911). Mr. Wharton's statement holds good for the United States, but it is not true that such inquisitions are permitted in England or Canada, Australia or New Zealand.

"For the preliminary inquisition of one not yet charged with an offense the claims of privilege seem equally valid. * * * A system of inquisition, properly so-called, signifies an examination on more suspicion without prior presentment, indictment or other formal accusation. And the contest for 100 years centered solely on the abuse of such system. * * * Under any system which permits John Doe to be forced to answer on the mere suspicion of an officer of the law or on public rumor or on secret betrayal, two abuses have always prevailed and inevitably will prevail,—first, the petty judicial officer becomes a local tyrant." Wigmore on Evidence, Sec. 2251.

"The protection of the prisoner against examination previous to trial should be rigorously maintained." Harvard Law Review, Vol. II, p. 220.

"Neither judge, magistrate nor juryman can interrogate an accused person unless he offers himself as a witness, or require him to answer questions tending to incriminate himself. Much less then ought a constable do so whose duty as regards that person is simply to arrest and detain him in safe custody. * * * For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong." From the address to police constables on their duties by Lord Brampton (Mr. Justice Hawkins).

A letter written September, 1921, by E. A. Godson, Barrister at Law, and Sir Thomas Hughes, K. C., says:

"After they (the police) have decided to arrest him or he is in custody or on bail awaiting trial, it is a definite and well recognized rule that no further questions are to be asked of him."

Following the report of the Royal Commission the judges were requested by the Home Office in charge of the police to elucidate certain rules which they had issued years ago. Of these rules the third read:

"Persons in custody should not be questioned without the usual caution being first administered."

But the first sentence of their seventh rule read thus:

"A person making a voluntary statement must not be cross-examined and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said."

The Home Office, in view of the recommendations of the Royal Commission, asked the judges how the third and seventh rules were to be reconciled. The judges replied as quoted in Manchester Guardian, July 25, 1930, as follows:

"Rule 3 was never intended to encourage or authorize the questioning or cross-examination of a person in custody after he has been cautioned on the subject of the crime for which he is in custody; long before this rule was formulated and since it has been the practice for the judge not to allow any answer to a question so improperly put to be given in evidence. But in some cases it may be proper and necessary to put questions to a person in custody after the caution has been administered. For instance, a person arrested for burglary may, before he is formally charged, say, 'I have hidden or thrown the property away,' and after caution he would properly be asked where had he hidden or thrown it, or a person before he is formally charged as an habitual criminal is properly asked to give an account of what he has done since he last come out of prison."

A Texas statute forbids admission of evidence of any confession made by a person in custody unless made in writing signed by the accused. General Laws of Texas, 1907, Ch. 18, page 219, Article 727, and see 4 Texas Law Review, 499 (1925-6).

2. Quotation from address by Atty. Gen. Mitchell.

3. Quotation from Report of N. Y. City Bar Association. See note 8 of committee's report.

4. It will be understood that Judge Hallam does not concur in No. 12.

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